U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 06 December 2006

CASE NO.: 2004-BLA-6818

In the Matter of:

M. P. A.,
Claimant

v.

NORTH BRANCH COAL COMPANY,
Employer

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Ron Carson, Benefits Counselor/Lay Representative,
For the Claimant

Francesca Maggard, Esq.,
For the Employer

Suzanne Brennan, Esq.,
For the Director

BEFORE: THOMAS M. BURKE
Associate Chief Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a miner's claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, as amended ("Act"), filed on May 15, 2003. The act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers' pneumoconiosis" ("CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

A prior claim was filed on October 20, 1997. (DX 1). On March 20, 1998, a Department of Labor claims examiner found that Claimant was not totally disabled due to coal workers' pneumoconiosis. Claimant was permitted to submit further evidence before the District Director. No further action was taken on the October 20, 1997 claim. As such, the claim was administratively closed.

The claimant filed the present claim for benefits on May 15, 2003. (DX 3). On May 28, 2004, the claim was denied by the district director because the evidence failed to establish the elements of entitlement that claimant was totally disabled due to pneumoconiosis. (DX 42). On June 25, 2004, Claimant requested a formal hearing before an Administrative Law Judge. (DX 43).

On September 28, 2005, a hearing was held in Abingdon, Virginia by the undersigned Administrative Law Judge, at which the employer and Director, Office of Workman Compensation Programs were represented by counsel.[1] Claimant was represented by a lay representative. The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-4, Director's exhibits ("DX") 1-48, and Employer's exhibits ("EX") 1-2 were admitted into the record. Claimant submitted an X-ray interpretation by Dr. Alexander of the June 9, 2005 X-ray after the hearing. This exhibit is hereby admitted as Claimant's exhibit 5. Employer submitted the following evidence post-hearing: (1) a supplemental report by Dr. Fino and (2) a review of the January 11, 2001 biopsy slides by Dr. Caffrey. Such exhibits are hereby admitted into the record as Employer's exhibits 3 and 4, respectively. Both parties submitted closing arguments.

ISSUES

I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[1] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(en banc), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

I. Background

The claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least eighteen and one half years, as stipulated to by the parties. (Hearing Transcript (TR) 8). The claimant filed his claim for benefits, under the Act, on May 15, 2003. None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

North Branch Coal Company is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart G, Part 725 of the Regulations.

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife. Claimant has been married since May 18, 1970.

II. Medical Evidence

A. Chest X-rays[2]

The following is a summary of the chest X-ray evidence under consideration in this claim.

Exh. #	Dates: 1. X-ray 2. Read	Reading Physician	Qualifications	ILO Classification
DX 15	4/28/2003 5/6/2003	Dr. Ahmed	B, BCR	1/0
DX 15	4/28/2003 9/10/2003	Dr. Pathak	B, BCR	1/1
DX 19	4/28/2003 2/19/2004	Dr. Scott	B, BCR	Negative.
EX 2	4/28/2003 2/19/2004	Dr. Wheeler	B, BCR	Negative.
DX 14	7/9/2003 7/9/2003	Dr. Baker	B	1/0
DX 14	7/9/2003 7/28/2003	Dr. Barrett	B, BCR	Quality only reading.
DX 18	7/9/2003 2/19/2004	Dr. Wheeler	B, BCR	Negative.
DX 16	10/28/2003 10/28/2003	Dr. Dahhan	B	Negative.
CX 1	10/28/2003 7/2/2004	Dr. Alexander	B, BCR	1/1

[2] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e) (effective Jan. 19, 2001).

Exh. #	Dates: 1. X-ray 2. Read	Reading Physician	Qualifications	ILO Classification
EX 1	6/9/2005 6/16/2005	Dr. Fino	B, BCI(P)	Negative.
CX 5	6/9/2005 9/24/2005	Dr. Alexander	B, BCR	1/0

* A-A-reader; B-B-reader; BCR – Board Certified Radiologist; BCP – Board-Certified Pulmonologist; BCI – Board-Certified Internal Medicine; BCI(P) – Board-Certified Internal Medicine with Pulmonary Medicine sub-specialty. Readers who are Board-certified radiologists and/or B-readers are classified, as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987) and *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

B. Pulmonary Function Studies[3]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV1) and maximum voluntary ventilation (MVV).

Physician Date Exh. #	Age Height	FEV1	MVV	FVC	Qualify*
Dr. Baker 7/9/2003[4] DX 14	50 68.25"	1.94		2.50	Yes
Dr. Dahhan 10/28/2003 DX 16	50 67.7"	1.54 1.52+		2.09 1.94+	Yes Yes
Dr. Smiddy 12/5/2003 DX 15	50 70"	1.71		2.45	Yes
Dr. Narayanan 3/2/2004 CX 2	51 70"	1.59		2.29	Yes
Dr. Fino 6/9/2005 EX 1	52 69"	1.26		1.75	Yes

+ Results after the use of bronchodilators

[3] § 718.103(a)(Effective for tests conducted after Jan. 19, 2001 (See 718.101(b)), provides: "Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop)." 65 Fed. Reg. 80047 (Dec. 20, 2000).

[4] Dr. Michos, Board-certified in internal medicine and pulmonary medicine, reviewed this ventilatory study. He found that the vents are not acceptable due to less than optimal effort, cooperation and comprehension. (DX 14).

* A "**qualifying**" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

At the hearing, Claimant withdrew an April 23, 2003 pulmonary function study. (TR 27).

For a miner of the claimant's height of 69 inches, § 718.204(b)(2)(i) requires an FEV1 equal to or less than 2.13 for a male 52 years of age.[5] If such an FEV1 is shown, there must be in addition, an FVC equal to or less than 2.68 or an MVV equal to or less than 85; or a ratio equal to or less than 55% when the results of the FEV1 tests are divided by the results of the FVC test.

C. Arterial Blood Gas Studies[6]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date Exh. #	Physician	PCO2	PO2	Qualify
7/9/2003 DX 14	Dr. Baker	43	74	No
10/28/2003 DX 16	Dr. Dahhan	49.3 46.5*	76.7 79.8*	No No
6/9/2005 EX 1	Dr. Fino	43.8	80.3	No

* Results after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

D. Physicians' Reports[7]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(A)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical laboratory diagnostic techniques, concludes that a miner's respiratory or

[5] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th Cir. 1995). I find the miner is 69" here, his average reported height.

[6] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.

> 20 C.F.R. § 204(b)(2) permits the use of such studies to establish "total disability." It provides:
> In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii) or (iv) of this section shall establish a miner's total disability:…
> (2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…

[7] *Dempsey v. Sewell Coal Co. & Director, OWCP*, ___ B.L.R. ___, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004). Under (new) 2001 regulations, expert opinions must be based on admissible evidence.

pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Daniel, a Board-certified thoracic surgeon, submitted a letter which stated that he operated on Claimant on January 11, 2001 and December 5, 2001 for metastatic squamous cell cancer. He stated that his lung tissue also showed uncomplicated silicoanthracosis. (DX 13).

Dr. Malcolm, a Board-certified pathologist, reviewed the January 11, 2001 lung biopsies. In her report, dated January 11, 2001, she reviewed portions of the right upper and lower lung lobes. In the right upper lobe, she found a tumor measuring 1.5 x 0.8 x 0.8 cm. Dr. Malcolm also found anthracotic nodules of tissue. She found no gross evidence of tumor in the lower lobe. Dr. Malcolm stated that the lung shows extensive anthracosis in the peripheral portion. Under diagnosis, Dr. Malcolm listed metastatic squamous cell carcinoma, changes consistent with silicoanthracosis, a silitoic nodule and uncomplicated silicoanthracosis. (DX 12).

Dr. Caffrey, a Board-certified pathologist, also reviewed the January 11, 2001 biopsy slides. Dr. Caffrey stated that slide one is a wedge resection of the right upper lobe. He found diffuse squamous cell carcinoma which is moderately differentiated and has capillary and lymphatic infiltration. Dr. Caffrey further stated "[A]djacent lung tissue does show some lesions of simple coal workers' pneumoconiosis consistent of anthracotic pigment with reticulin and minimal focal emphysema." (EX 4).

Dr. Caffrey also discussed a slide from a peribronchial lymph node. He explained that the slide showed metastatic squamous cell carcinoma. He also found anthracotic pigment. After reviewing the slides, Dr. Caffrey concluded that claimant has squamous cell carcinoma of the right lung and simple coal workers' pneumoconiosis. (EX 4).

On July 9, 2003, Dr. Baker, a B-reader and Board-certified in internal medicine and pulmonary disease, examined Claimant. (DX 14). Dr. Baker noted a 20 year coal mine employment. He also noted that Claimant never smoked cigarettes. Dr. Baker lists Claimant's symptoms as sputum, wheezing, dyspnea, cough, hemoptysis, orthopnea and occasional shortness of breath at night. These symptoms have been occurring for 6 to 10 years. (DX 14).

Based on his examination, Dr. Baker diagnosed coal workers' pneumoconiosis, chronic bronchitis, moderate restrictive ventilatory defect and hypoxemia. Dr. Baker classified Claimant's impairment as mild to moderate. He found coal dust exposure to be the cause of his impairment. Dr. Baker also found that Claimant does not have the respiratory capacity to perform the work of a coal miner. Dr. Baker noted that the coal workers' pneumoconiosis was revealed on chest X-ray and by biopsy evidence. (DX 14).

Dr. Smiddy, Board-certified in internal medicine, prepared a consultation note and a progress noted. His consultation report, dated November 4, 2003, lists Claimant's current symptoms as chronic cough, sputum productive, exercise limitation, wheezing and shortness of breath. His past medical history notes surgery for metastatic squamous cell cancer and coal workers' pneumoconiosis. Dr. Smiddy also notes "heavy coal dust exposure." Dr. Smiddy listed his diagnosis as follows: (1) history of lacrimal duct cancer with multiple metastasis and

extensive follow-up therapy; (2) underlying coal workers' pneumoconiosis; and (3) element of chronic bronchitis. Dr. Smiddy prescribed a Combivent inhaler. (DX 15).

In a progress noted, dated December 5, 2003, Dr. Smiddy notes that Claimant was improved after being placed on the Combivent inhaler. Dr. Smiddy performed a pulmonary function study. He stated that the results revealed a severe restrictive ventilatory defect. (DX 15).

On February 17, 2005, Dr. Smiddy noted that Claimant has bronchitis, coal workers' pneumoconiosis and a history of multiple cancers. On February 24, 2005, Claimant had a follow-up visit with Dr. Smiddy. Dr. Smiddy stated that a chest X-ray revealed coal workers' pneumoconiosis and borderline heart size. He also noted that a pulmonary function study revealed moderate obstructive defect. Dr. Smiddy diagnosed: (1) Bronchitis; (2) Coal workers' pneumoconiosis; and (3) Previous history of lachrymal carcinoma, which apparently metastasized to his lungs. Dr. Smiddy saw Claimant again for a follow-up office visit, on July 29, 2005. Dr. Smiddy diagnosed: (1) Lachrymal carcinoma, metastatic to the chest, post resection; and (2) underlying pneumoconiosis. (CX 4).

Dr. Dahhan, a B-reader and Board-certified in internal medicine and pulmonary medicine, examined the Claimant on October 28, 2003. He explained his findings in a report, dated November 10, 2003. Dr. Dahhan noted that Claimant is a non-smoker and worked in the coal mines for 21 years. He stated that Claimant left the mines in 1994 when he was diagnosed with squamous cell carcinoma of the right sinus area. Dr. Dahhan performed a chest X-ray, a pulmonary function study and an arterial blood gas study. He stated that the pulmonary function study showed a moderate restrictive defect with no improvement after bronchodilators. He found that the chest X-ray showed no pleural or parenchymal abnormalities consistent with pneumoconiosis. Dr. Dahhan also reviewed Claimant's medical records. (DX 16).

Based on his examination and review of the medical records, Dr. Dahhan concluded that claimant has pathological findings sufficient to justify the diagnosis of simple coal workers' pneumoconiosis. He did not find evidence of complicated coal workers' pneumoconiosis or progressive massive fibrosis. Dr. Dahhan stated: "[Claimant] has post right upper and middle lobectomy with possible mass in the left hilar area, indicating a recurrence of his squamous cell carcinoma. All of these conditions are impairing his ventilatory capacity and cause him to have total and permanent pulmonary disability." Dr. Dahhan opined that coal dust exposure did not cause, or contribute to, his pulmonary disability. (DX 16).

Dr. Dahhan prepared a supplemental report, dated March 15, 2004. Dr. Dahhan reviewed medical evidence which is in the record. After reviewing this information, Dr. Dahhan reiterated his conclusion that Claimant has pathological findings sufficient to justify the diagnosis of coal workers' pneumoconiosis. He also explained that Claimant's reduction in his pulmonary function testing is a result of his previous resection of his right upper lobe and part of his right middle lobe. Dr. Dahhan concluded that Claimant does not have the pulmonary capacity to return to his previous coal mine employment. He also reiterated his conclusion that claimant's pulmonary disability is not due to coal workers' pneumoconiosis. (DX 17).

Dr. Fino, a B-reader and Board-certified in pulmonary medicine, examined Claimant on June 9, 2005. (EX 1). Dr. Fino noted a 22 year coal mine employment. He also noted that Claimant never smoked cigarettes. Claimant communicated to Dr. Fino that he has been suffering from shortness of breath for the last ten years. (EX 1).

In defining Claimant's past medical history, Dr. Fino explained that Claimant had cancer of the sinus in 1997 which required surgery. He stated that the cancer spread to the brain and the lung, resulting in removal of the right upper lung lobe and a portion of the right middle lung lobe. Lung cancer was diagnosed in 2001. (EX 1).

Dr. Fino performed a chest X-ray during the examination. He stated "[T]here were no pleural and no parenchymal abnormalities consistent with an occupationally acquired pneumoconiosis and I classified the chest X-ray as 0/0." Due to the cancer removal, Claimant has volume loss in the right lung. (EX 1).

Dr. Fino also performed a pulmonary function study. Dr. Fino stated that there is clearly a reduction in pulmonary function values. He explained, however, "this very well may be a combination of both decreased pulmonary capacity due to lung tissue resection plus the air leak caused by his nasal surgery." Dr. Fino concluded that no intrinsic lung disease caused the reduction. Dr. Fino found the arterial blood gas study to be normal. (EX 1).

Based on his examination of the Claimant and review of his medical records, Dr. Fino diagnosed metastatic cancer of the lungs and simple coal worker' pneumoconiosis. Dr. Fino found that the small amount of pneumoconiosis has not resulted in any functional impairment. He explained that Claimant has a functional impairment due to the fact that at least 50% of his right lung was removed and that he still has metastatic cancer of the lungs. Dr. Fino concluded that Claimant is totally disabled. He found claimant's disability unrelated to his coal workers' pneumoconiosis. (EX 1).

Dr. Fino prepared a supplemental report, dated October 26, 2005. After reviewing the March 2, 2004 pulmonary function study, Dr. Smiddy's reports and Ms. Brooks' office notes, Dr. Fino stated that such information did not change any of his previous opinions. (EX 3).

III. Medical Office Notes

The record contains office notes authored by Kellie Brooks. Ms. Brooks has a masters of science in nursing and a family nurse practitioner certificate. (DX 15). The notes are dated April 28, 2003. Ms. Brooks notes a 19-21 year coal mine employment and that Claimant never smoked cigarettes. Ms. Brooks lists Claimant's symptoms as productive daily cough, wheezing, shortness of breath and two-pillow orthopnea. In his past medical history, Ms. Brooks notes coal workers' pneumoconiosis, metastatic squamous cell carcinoma and chronic obstructive pulmonary disease. Under assessment, Ms. Brooks states "coal workers' pneumoconiosis." (DX 15).

Office notes by Kellie Brooks, dated May 2, 2005, were also submitted into the record. Ms. Brooks noted that Claimant is using a Combivent inhaler to assist with his shortness of breath. She notes that Claimant has shortness of breath and two pillow orthopnea. Ms. Brooks

states that the plan for treatment is to continue being followed by the Respiratory Care Clinic for his coal workers' pneumoconiosis. (CX 3).

IV. Witness' Testimony

Claimant testified at the September 28, 2005 hearing. (TR 10). Claimant stated that he last worked for North Branch Coal Company in Tazewell, Virginia. Claimant started working for North Branch Coal Company in February or March of 1992 and left the mines in June, 1995. Claimant was a superintendent when he left the mines. Claimant explained that, as a superintendent, he was underground in the mines eight hours a day. (TR 12).

Claimant first noticed that he was having breathing problems in the mid 1980's. (TR 14). He also testified that his breathing has gotten worse since he left the mines. (TR 16). Claimant explained that he takes two puffs of a Combivent inhaler four times a day. Claimant never smoked cigarettes. (TR 17).

Claimant was diagnosed with sinus cancer in 1997. Thereafter, the cancer spread to his lungs and the right upper lobe was removed. A wedge section of the right middle lobe was also removed. (TR 22).

ENTITLEMENT TO BENEFITS

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and *Perry v. Director, OWCP,* 9 B.L.R. 1-1 (1986). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cir. 1987). Failure to establish any of these elements precludes entitlement. Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*, 338 F.3d 501, No. 01-4604 (6th Cir. July 31, 2003), *citing Greenwich Collieries [Ondecko]*, 512 U.S. 267 at 281.

A. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R § 718.201.

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106;[8] (3) application of the irrebutable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence. 20 C.F.R. § 718.202(a)(1). The correlation between "physiologic and radiographic abnormalities is poor" in cases involving CWP. "[W]here two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." *Id.*; *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985)." (Emphasis added). Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-231, n.5 (1985).

As discussed above, the record contains chest X-rays, dated April 28, 2003, July 9, 2003, October 28, 2003 and June 9, 2005. There are conflicting interpretations of each of these chest X-rays.

The April 28, 2003 X-ray was interpreted by four dually-qualified physicians. Two interpreted the X-ray as positive for coal workers' pneumoconiosis and two interpreted the X-ray as negative for coal workers' pneumoconiosis. Due to the equal qualifications of the physicians, I find this X-ray to be in equipoise. Thus, it neither proves nor disproves the existence of coal workers' pneumoconiosis.

A B-reader and a dually-qualified physician interpreted the July 9, 2003 X-ray for the existence of coal workers' pneumoconiosis. The B-reading is positive for coal workers' pneumoconiosis. Dr. Wheeler, a dually-qualified physician, interpreted the X-ray as negative for coal workers' pneumoconiosis. I find that the interpretation by the dually-qualified physician is entitled to more weight. As such, I find the July 9, 2003 X-ray negative for coal workers' pneumoconiosis.

[8] A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis, but positive results will constitute evidence of the presence of pneumoconiosis. 20 C.F.R. § 718.106(c).

Dr. Alexander, a dually-qualified physician, and Dr. Dahhan, a B-reader, interpreted the October 28, 2003 X-ray. Dr. Alexander found the X-ray positive for coal workers' pneumoconiosis while Dr. Dahhan interpreted the X-ray as negative. As with the July 9, 2003 X-ray, I accord more weight to the interpretation by the dually-qualified physician. Thus, I find the October 28, 2003 X-ray positive for coal workers' pneumoconiosis.

The June 9, 2005 X-ray also has one interpretation by a B-reader and one interpretation by a dually-qualified physician. The B-reading is negative for coal workers' pneumoconiosis and the dually-qualified reading is positive. Following the same rationale as above, I accord more weight to the dually-qualified reading. Therefore, I find the June 9, 2005 X-ray is positive for coal workers' pneumoconiosis.

In summary, I find the April 28, 2003 X-ray in equipoise, the July 9, 2003 X-ray negative and the October 28, 2003 and June 9, 2005 X-rays positive for coal workers' pneumoconiosis. I also find that the positive interpretations are supported by the biopsy evidence discussed below.

Biopsies were performed on Claimant's right lung on January 11, 2001. Dr. Daniel performed the operation and found uncomplicated silicoanthracosis. Dr. Malcolm reviewed the January 11, 2001 lung tissue biopsies. She found anthracotic nodules of tissue and uncomplicated silicoanthracosis. At the request of the Employer, Dr. Caffrey also reviewed the January 11, 2001 lung biopsies. Based on his review, Dr. Caffrey found squamous cell carcinoma of the right lung and simple coal workers' pneumoconiosis. Due to the consistent interpretations of the physicians reviewing the biopsy slides, I find that Claimant has proven the existence of simple coal workers' pneumoconiosis through biopsy.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray, 20 C.F.R. § 718.202(a).

Drs. Baker, Smiddy, Dahhan, and Fino agree that Claimant has coal workers' pneumoconiosis. Thus, in addition to the positive chest X-ray interpretations and biopsy reviews, Claimant has also proven the existence of coal workers' pneumoconiosis by physician opinion.

The overwhelming weight of the evidence supports a finding of coal workers' pneumoconiosis. As such, I find the Claimant has met his burden of proof in establishing the existence of pneumoconiosis.

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b).

Since the miner had ten years or more of coal mine employment, he receives the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. Nor does

the record contain contrary evidence that establishes the claimant's pneumoconiosis arose out of alternative causes.

D. Existence of total pulmonary disability

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b). Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills; and lay testimony.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718.

The record contains pulmonary function studies, dated July 9, 2003, October 28, 2003, December 5, 2003, March 2, 2004 and June 9, 2005. All of these studies produced qualifying results. Dr. Michos determined that the July 9, 2003 study is not acceptable. Notwithstanding the July 9, 2003 study, I find that Claimant has proven total disability by pulmonary function studies due to the numerous qualifying studies and no non-qualifying studies.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii).

Arterial blood gas studies were performed on July 9, 2003, October 28, 2003 and June 9, 2005. None of these studies produced qualifying results. As all the studies are non-qualifying, Claimant has not proven total disability by arterial blood gas studies.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b).

Drs. Baker, Dahhan and Fino agree that Claimant has a totally disabling pulmonary disability. Dr. Smiddy did not produce an opinion regarding disability. But, in his progress notes, he noted a severe restrictive impairment. The agreement of the physicians supports a finding of total disability due to a pulmonary impairment.

Thus, notwithstanding the non-qualifying arterial blood gas studies, I find that Claimant has proven the existence of a totally disabling impairment by pulmonary function studies and physician opinions. Therefore, I find the claimant has met his burden of proof in establishing the existence of total disability. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3rd Cir. 1993).

E. Cause of total disability

The revised regulations, 20 C.F.R. § 718.204(c)(1), requires a claimant to establish his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability. The January 19, 2001 changes to 20 C.F.R. § 718.204(c)(1)(i) and (ii), adding the words "material" and "materially", results in "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. No. 245, 7999946 (Dec. 20, 2000).

The Fourth Circuit Court of Appeals requires that pneumoconiosis be a "contributing cause" of the claimant's total disability. *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). In *Street,* the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to the disability." *Street*, 42 F.3d 241 at 245. [9]

If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 38 (4th Cir. 1990).

As summarized above, Dr. Baker concluded that Claimant has coal workers' pneumoconiosis and that coal dust exposure caused his pulmonary impairment. Dr. Baker did not provide an explanation as to why coal dust exposure caused his pulmonary impairment. Additionally, he made no mention of how Claimant's squamous cell carcinoma affected his pulmonary impairment. Although Claimant is not required to rule out other possible causes of his disability, clearly a resection of the lung due to lung cancer must be considered when determining the cause of Claimant's pulmonary impairment. Dr. Baker merely provided a conclusory statement without any explanation or rationale. Due to his conclusory opinion, I find Dr. Baker's opinion entitled to less weight than the opinions of Drs. Fino and Dahhan.

Dr. Dahhan concluded that Claimant has coal workers' pneumoconiosis and is totally disabled. He, however, did not find that coal dust exposure contributed to his total pulmonary disability. Dr. Dahhan explained that Claimant's pulmonary disability is due to the previous resection of his right upper lung lobe and part of his right middle lobe. He noted that this caused a result in pulmonary function. Dr. Dahhan discussed that Claimant's lobectomy and possible recurrence of his squamous cell carcinoma are impairing his ventilatory capacity. Dr. Dahhan

[9] *Gross v. Dominion Coal Corp*., 23 B.L.R. 1-8, BRB No. 03-0118 (2003). "'The substantially contributing cause' standard of revised Section 718.204(c) was not intended to alter the meaning of 'total disability due to pneumoconiosis' as previously determined in decisions by the various United States Courts of Appeal under Part 718, but rather was intended to codify the courts' decisions. 65 Fed. Reg. at 79946-47. *See Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (CA4 1990)(holding that a claimant must prove that pneumoconiosis is at least a contributing cause of total disability). Pneumoconiosis must be a necessary condition of the claimant's disability in that it cannot play a merely de minimis role. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n. 8, 19 B.L.R. 2-304, 2-320 n.8 (4th Cir. 1995)." (Fn 10, at 1-18) "Consequently, the revised regulation requires that the adverse effect of pneumoconiosis be 'material.'"

adequately considered Claimant's coal dust exposure and cancer history in determining the cause of Claimant's total pulmonary disability.

Dr. Fino's opinion is in agreement with Dr. Dahhan. Dr. Fino explained that Claimant's cancer removal caused volume loss in the right lung. He also noted that the decreased pulmonary capacity is due to the lung tissue resection. Dr. Fino found that no intrinsic lung disease caused Claimant's pulmonary reduction. Additionally, Dr. Fino stated that Claimant's small amount of pneumoconiosis did not result in any functional impairment. Based on Dr. Fino's rationale, I find his opinion better reasoned than Dr. Baker's opinion. As previously stated, Dr. Smiddy's progress notes noted a severe restrictive impairment, however he offered no opinion on its cause.

After reviewing all of the evidence, I find that Drs. Fino and Dahhan provided reasoned opinions supported by the objective evidence of record. I find that Dr. Baker provided a conclusory opinion that did not adequately consider Claimant's complete pulmonary condition. Therefore, I find that Claimant has not met his burden in proving the existence of total disability due to coal workers' pneumoconiosis.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has pneumoconiosis, as defined by the Act and Regulations. The pneumoconiosis did arise out of his coal mine employment. The claimant is totally disabled. His total disability, however, is not due to pneumoconiosis. He is therefore not entitled to benefits.

ORDER

It is ordered that the claim of M. P. A. for benefits under the Black Lung Benefits Act is hereby DENIED.

A
THOMAS M. BURKE
Associate Chief Judge

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[10] At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter to **Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

[10] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.